

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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In the Review of the)
California High Cost Fund)
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R.06-06-028

**COMMENTS OF SPRINT NEXTEL
ON PROPOSED DECISION IMPLEMENTING
CALIFORNIA ADVANCED SERVICES FUND**

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Introduction

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, Sprint Communications Company, L.P. (U 5112 C), Sprint Telephony PCS, L.P. (U 3064 C), Sprint Spectrum L.P. as agent for Wireless Co., L.P. (U 3062 C) *dba* Sprint PCS, and Nextel of California, Inc. (U 3066 C) (collectively, "Sprint Nextel"), respectfully submit these Comments on the November 20, 2007 Proposed Decision of Commissioner Chong ("PD") creating the California Advanced Services Fund ("CASF").

Sprint Nextel supports the goal underlying creation of the CASF – to hasten the further availability of broadband service in California.¹ Indeed, Sprint Nextel has been and is investing substantial sums in California to help achieve that goal through deployment of its mobile EV-DO and WiMax technologies.² Given the steps that it and other carriers are already taking to make broadband more widely available in California, Sprint Nextel has substantial reservations whether the CASF is necessary or appropriate at this time. These reservations involve both policy and legal concerns, most importantly as to whether the Commission has jurisdiction to create the CASF. If it elects to move forward with the CASF, as appears likely, despite these policy and legal concerns, the Commission should take steps to ensure that the CASF is appropriately focused on those areas where, at least on the PD's premises, it is most needed, *i.e.*, areas that today are completely "unserved" by any provider of broadband service. The comments below are offered in the spirit of assisting the Commission to achieve that goal.

Discussion

I. THERE ARE SUBSTANTIAL POLICY REASONS WHY THE COMMISSION SHOULD NOT CREATE THE CASF.

If the Commission were to authorize creation of the CASF as envisioned in the PD, it would send a counter-productive message to entrepreneurs and investors that they either should

¹ The Federal Communications Commission ("FCC") describes "broadband" as services with transmission speeds in excess of 200 kilobits per second (kbps) in at least one direction. *See* High-Speed Services for Internet Access: Status as of June 30, 2006, Industry Analysis and Technology Division, Wireline Competition Bureau, January, 2007, at 1, n.2, n. 4, available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf, cited in PD at 4, n. 8. Under that definition, Sprint already offers broadband in a large portion of California. In contrast, the PD proposes to adopt a definition of "broadband" as an Internet access service offering a minimum "downstream" speed of 3 megabits per second ("MBPS") and minimum "upstream" speed of 1 MBPS. *See id.* at 28.

² Sprint Nextel's currently deployed wireless EV-DO technology offers downstream Internet access at speeds ranging between 600 kilobits per second ("kbps") and 1.4 MBPS downstream and 300 to 500 kbps upstream. Sprint Nextel anticipates that its soon to be deployed WiMax technology will offer Internet access at speeds between 1 to 3 MBPS downstream and 500 kbps to 1.5 MBPS upstream. Since it provides downstream speeds in excess of 3 MBPS and upstream speeds in excess of 1 MBPS, Sprint's WiMax service would qualify as "broadband" under the PD, even if, like other Internet access services, it operates within a "range" of speeds rather than at a single speed.

not invest or should delay investing in broadband in California. The Commission would be wrongly subsidizing new firms to enter the market and compete against firms that *pioneered* the market. The Commission would also be telling would-be market entrants that, if they wait long enough, the Commission might subsidize their market entry. The Commission should take care not to send such a message, as it would only discourage further investment in California. Surely the sending of such a message could not possibly be the Commission's intention – but carriers that have already invested millions and millions of dollars to develop their existing broadband capabilities would likely see the Commission's action, if the PD is adopted, in that light.

If the Commission were to provide CASF funding for areas that already have one broadband provider, but are mistakenly characterized (as in the PD) as “underserved” areas,³ the Commission would effectively be subsidizing market entry by “Johnny-come-latelys” in areas where entrepreneurs have already taken the risk, and invested substantial sums of money, to be the first carrier to make broadband available to their customers.

The PD claims that the “the market has failed” and that “market forces [have] fail[ed].”⁴ On the contrary, market forces have not failed: market forces have shown those who would invest the funds necessary for bringing broadband to California that, in certain areas, there is not sufficient demand to warrant making the substantial investments necessary for providing broadband service. Investors perceive that, in certain areas, costs would be high and rewards would be low. This is the operation of market forces *par excellence*. In a nutshell, investors and carriers are neither unaware of market conditions nor insensitive to market forces. If the market wants a service, carriers will step up to provide it, and if the market does not want a service, investors and carriers will wisely refrain from investing funds that they almost surely are going to lose. This is not a “failure” of market forces, it is, rather, a vindication of market forces. The PD, however, unfortunately reflects the (apparent) belief that it is necessary and appropriate for the Commission to interfere with market forces⁵ - and not just in “unserved” areas, which might

³ As the PD reads now, an “underserved” area would be any area that has only one broadband provider. *See id.* at 40 (an “underserved” area is “an area with only one facilities-based provider capable of providing [3 MBPS download and 1 MBPS upload] speeds to all customers”). Assuming that this definition was not what the PD really intended, the Commission should modify the PD, if it elects to move forward with the CASF, to provide that any area that has one (even if only one) facilities-based provider capable of offering such speeds would be deemed “served.”

⁴ PD at 6. Nor will it suffice to point to “the goals of the Legislature for telecommunications in California,” *id.*, since, again, broadband is not telecommunications.

⁵ Ironically, the PD asserts, “. . . we believe that solutions to the digital divide are best driven by market forces within the telecommunications and internet industry” *Id.* at 6. Although on the one hand the PD asserts that it is merely providing “limited funding” for broadband, *see id.* at 10, it elsewhere asserts that, “after the initial two-year period of the surcharge, the Commission may choose to continue the CASF surcharge to ensure that the benefits of advanced services are made available to all Californians.” *Id.* at 24; *see also id.* at 26. It appears likely

be understandable, but even in potentially very large areas of California that the PD generously terms “underserved” (which could result in funding that principally benefits the ILECs alone). In contrast, with comparatively minor changes, as suggested below, the Commission could ensure that CASF primarily focuses on “unserved” areas.

In assessing the need for the CASF on policy grounds, the Commission should keep in mind that broadband roll-out is still in its developing stages. That all broadband providers have not fully built their systems and facilities in every corner of the state, or are not yet offering the highest speed service that they ultimately envision offering, is not surprising or alarming and, even if it were, it should not be seen as an indication that they never will offer what the PD (whether it is modified or not) terms “broadband.” When SBC first announced Project Pronto for the roll-out of digital subscriber line (“DSL”) service, it indicated that it would take at least three years to reach 80% of the households within its service territory.⁶ And when AT&T announced its “Project Lightspeed” “fiber to the node” (“FTTN”) service, it estimated that it would take three to five years to reach 80% of its subscribers.⁷ In both instances, the estimates appear to have proved somewhat overoptimistic, but there is nothing unusual or alarming in that fact at all.⁸ The Commission need not fear that broadband will not be broadly available throughout California. The Commission should recognize that there is no reason to pay subsidies for broadband roll-out that will occur anyway. Ironically, if the Commission adopts the PD, companies may even slow down their deployment of broadband systems and facilities in California so that they can receive a subsidy for an area where they planned to make an investment without any subsidy.⁹ Thus, if all of the broadband availability yielded by the PD (if it is adopted by the Commission) was, and is, going to occur anyway, the PD will, at best have

that the CASF and the Commission’s interference with market forces will continue indefinitely, since it would only require a new definition of “broadband” to find, yet again, “unserved or underserved areas of California” that supposedly require funding.

⁶ See “SBC Makes \$6 Billion Broadband Play,” internetnews.com, dated October 18, 1999, available at: <http://www.internetnews.com/xSP/article.php/220301>; see also San Francisco Chronicle, “Pacific Bell Expanding DSL Area,” December 20, 1999, available at:

<http://www.americasnetwork.com/americasnetwork/article/articleDetail.jsp?id=160512&sk=&date=&pageID=2>.

⁷ See “SBC’s Project Lightspeed Prepares for Triple-play Launch,” dated May 1, 2005, available at: <http://www.americasnetwork.com/americasnetwork/article/articleDetail.jsp?id=160512&sk=&date=&pageID=2>.

⁸ See *id.* SBC originally estimated that Project Lightspeed would be completed by the end of 2007. It does not appear that AT&T is yet close to achieving that goal. But if it is, then surely there is no reason – no reason at all – for the Commission to undermine the incentives that led AT&T to undertake such an ambitious project by subsidizing parties that come late to the table, years after AT&T envisioned and initiated Lightspeed.

⁹ For example, it would be interesting to know how extensively Verizon California has already deployed or plans to deploy its “FiOS Internet” service within its service territory within the next two to five years. If Verizon has already deployed “FiOS” throughout its service footprint, there is no need or justification for a CASF program within its service territory. If Verizon already is, or was, planning on extending “FiOS” throughout its service area, the Commission would essentially be wasting its money in paying for deployment that was slated to occur anyway.

slightly accelerated the spread of broadband in California in mostly minor ways. The “incremental bang” may be nowhere near worth the “buck” the Commission had to take from consumers in order to fund the CASF.

This interference with market forces will not only deter investment, it will also deprive consumers of services they otherwise would have been able to purchase. For example, if CASF fund recipients offering broadband services to consumers are unable (pursuant to the terms of the PD) to change broadband service prices for five years,¹⁰ such carriers will lack an incentive to offer any improved (but more expensive) services during that time period. (In the time frames usually associated with the Internet, five years is an eternity. The Commission need only think of the developments that the last five years have brought to the Internet.) The PD seems unaware of the potentially substantial downside to its interference with market forces, as if preferring enthusiasm over sound factual and economic analysis.

In addition, once an entrepreneur has taken the risk of spending substantial sums of money and deployed systems and facilities for broadband service, the Commission’s funding another provider would only serve to give the second provider *an unfair cost advantage*, since moneys that late-arriving carriers would have been forced to spend on deploying networks and equipment could instead be used for marketing their services against the carrier that saw the opportunity, took the risk, invested the money and *pioneered* the market. Proposing the availability of subsidies for “Johnny-come-latelys” undermines – and may even destroy – the incentive to be a “first mover” in any broadband market.¹¹ Thus, providing funding in areas that already have at least one, even if only one, broadband provider would be *exactly the wrong thing* for the Commission to do. Indeed, it is difficult to believe that the PD proposes to provide funding in areas that *already* have one (even if only one) broadband provider.¹²

¹⁰ See PD at 41.

¹¹ Even AT&T California, a party that might be expected to benefit from and support creation of the CASF, has noted the harm that would be created by subsidizing market entry by a second broadband provider in supposedly “underserved” areas. AT&T observed that: “. . . it is critical that the CASF not provide a subsidy to a new entrant if there is already a broadband provider in [a given] area. To do so will unavoidably affect the competitive market negatively by penalizing providers [that have] already built with their own capital. . . . [P]rivate investors will become less likely to enter California markets for fear of having to compete against a prospective, subsidized competitor. As proposed, the CASF will, in fact, create an adverse environment for infrastructure investment in California.” See AT&T Comments on ACR, *filed* September 26, 2007, at 2.

¹² Assume, for a moment, that the incumbent local exchange carriers (“ILECs”) had taken the risk of deploying what the PD terms broadband (Internet access at 3 MBPS downstream, 1 MBPS upstream) in their service areas using wireless technology, but the Commission was nevertheless proposing to provide subsidies to other providers to serve the same areas using a more expensive technology. No one even remotely familiar with the arguments and tactics used by the ILECs in front of the Commission could doubt for one moment that the ILECs would *protest as*

Accordingly, Sprint Nextel will assume, for the sake of discussion, that what the PD actually meant to say was that an area would be considered “served” if it had broadband with at least 3 MBPS downstream and 1 MBPS upstream, but “underserved” if it did not have at least 1 MBPS upstream (even if it did have 3 MBPS downstream). However, the “facts on the ground” demonstrate that this, too, would not be a wise policy choice.

At present, as far as Sprint Nextel is aware, the only providers of residential broadband as it is defined in the PD (with at least 3 MBPS downstream and 1 MBPS upstream) are cable-based providers, such as Comcast, Cox, or Time-Warner.¹³ Neither AT&T California (“AT&T”) nor Verizon California (“Verizon”), except for its “FiOS Internet” service in limited areas, offers broadband with an upstream speed of at least 1 MBPS. AT&T’s and Verizon’s fastest services, termed “elite” and “power,” respectively, offer upstream speeds of only 768 kbps.¹⁴ If the minimum upstream speed for identifying a “served” area for CASF purposes was not 1 MBPS, but only 768 kbps, then a much larger portion of California would be considered “served” and not eligible for CASF funding. The unfortunate appearance is that, by setting the minimum upstream speed at 1 MBPS, the PD wanted to make as much of California eligible for CASF subsidies for AT&T and Verizon as possible. However, the record is completely devoid of factual information as to what steps AT&T and Verizon would need to take (*e.g.*, whether they would only need to adjust settings on existing equipment, install new central office equipment, or construct new outdoor plant) to permit upstream speeds of at least 1 MBPS. The Commission can only hazard a guess as to what steps are required and whether it is actually necessary to establish a \$100 million program to increase the largest ILECs’ upstream broadband speeds.

According to the PD, the reason for setting the minimum upstream speed at 1 MBPS for purposes of determining whether, under the CASF, an area is already “served” by a broadband provider is that 1 MBPS is the minimum speed required “to effectively work from

vigorously as possible both the availability of subsidies *and* the idea that a more expensive technology than they had used would be subsidized against them. Hence, Sprint Nextel’s lack of enthusiasm for the CASF is hardly unusual.

¹³ As noted above, Sprint Nextel’s WiMax service will offer California consumers a wireless broadband option. In addition, Verizon California offers or may soon offer a fiber to the home (“FTTH”)-based service that it calls “FiOS Internet.” It is unclear how extensively “FiOS Internet” is or will be available within Verizon’s service territory in California. In areas where it is available, Verizon promises 30 MBPS downstream and 5 MBPS upstream. In those areas where Verizon has taken the initiative and spent the funds needed to deploy FiOs Internet, it is unlikely that Verizon would welcome the Commission’s funding up to 40% of a competitor’s costs.

¹⁴ The ILECs’ fastest and most expensive DSL services are referred to herein as “ILEC premium DSL service.” AT&T’s “elite” package offers 6 MBPS downstream, but only “up to 768” kilobits per second (“kbps”) upstream. See <https://swot.sbc.com/swot/dslMassMarketCatalog.do?do=view&serviceType=DYNAMICIP>. Similarly, Verizon’s “Power Plan” offers 3 MBPS downstream but only up to 768 kbps upstream. See <http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm>.

home.”¹⁵ This statement is completely unsupported by record evidence; the minimum 1 MBPS upstream speed seems to have been selected with other purposes in mind – and certainly seems to have been selected without any consideration having been given to the many advantages that could be, and already are, offered to end users (including public safety providers served by wireless carriers) through mobile broadband. The Commission should reconsider whether residential consumers, whether telecommuters or not, would consider it vital to have an upstream Internet access speed of 1 MBPS as opposed to 768 kbps. By any reasonable yardstick, an Internet access service that offers a download speed of 3 MBPS or higher and an upload speed of at least 768 kbps should be considered “broadband” for CASF purposes. Properly defining what “broadband” is for purposes of the CASF is critical to determining whether the CASF will properly serve its espoused policy objectives.¹⁶

Most Internet users focus far more heavily on the downstream speed than on the upstream speed. Although the PD claims that an upload speed of 1 MBPS is necessary to “effectively work from home,” Sprint Nextel believes this is mistaken: an upstream speed of at least 768 kbps is more than adequate for working from home or, for that matter, for working from an office. An upstream speed of 768 kbps will not interfere with or retard watching movies over the Internet, and it should prove adequate for most gaming and all Internet shopping. There is no evidence in the record that “telecommuting” or working from an office with AT&T’s or Verizon’s existing “ordinary” digital subscriber line (“DSL”) service offering upload speeds in the range of 300 to 400 kbps is not “adequate” for work purposes. Except for sending the very largest of files, *e.g.*, well in excess of 10 megabytes – which would be a comparatively rare event – the difference between an upstream speed of 1 MBPS and an upstream speed of 768 kbps would be virtually imperceptible to the end user. While the faster speed may sometimes be desirable, it would rarely, if ever, actually be critical. Having an additional 232 kbps on top of 768 kbps might occasionally be somewhat helpful, but the difference caused by not having it would scarcely be discernible, if at all, to the end user sending packets “upstream.” Even if the file being sent upstream were as large as 10 megabytes, the difference in delivery time between

¹⁵ See PD at 34.

¹⁶ Whether coincidentally or not, the CASF, if approved by the Commission, may serve to replace subsidies for alleged high-cost areas that were (or will be) lost by the ILECs as a result of D.07-09-020. See *Order Instituting Rulemaking into Review of the California High Cost Fund B Program*, R.06-06-028, Interim Opinion Adopting Reforms to the High Cost Fund-B Mechanism [D.07-09-020] (2007) __ CPUC 2d __, 2007 Cal. PUC LEXIS, *app. for reh. pending* (filed October 9, 2007, by The Utility Reform Network (“TURN”)).

sending the packets at 768 kbps versus 1 MBPS would be just a matter of seconds.¹⁷ The Commission should therefore reduce the minimum upstream speed *for CASF purposes* from 1 MBPS to 768 kbps. The result of doing so will be that a greater number of areas served by AT&T and Verizon will be deemed to *already* have broadband, with the result that more CASF moneys will be available for truly “unserved” areas. This is consistent, on a policy basis, with the purposes espoused for the CASF.

Rather than rushing to create a subsidy plan that ignores consumer choices and may reduce broadband investment that would have occurred without the subsidy, the Commission should wait for the California Broadband Task Force Report to be released¹⁸ before it takes any action in this proceeding, as the Report might provide the Commission with further information regarding the necessity, if any, for the CASF. For purposes of designing the CASF and assessing the adequacy of the \$100 million proposed for the CASF, it would be tremendously helpful to know the areas in California that already have access to broadband from cable modem-based and wireless providers and would therefore likely be termed “served,” as well as the areas that today have access to AT&T’s “elite” or Verizon’s “power” DSL services and would be considered “served” but for the proposed minimum upstream speed of 1 MBPS. It is surprising that the Commission would not want to wait for the Task Force Report before voting on the PD.

Presumably, the Report will help the Commission distinguish between areas that (depending on how these terms are ultimately defined in the Commission’s decision) are “served,” “underserved” or “unserved.” However, judging from the PD, it appears that the Commission is determined to move forward even before the Report is released. In the absence of information showing the portions of California that are “served,” “underserved” and “unserved,” the most prudent assumption is probably that there are still portions of California that would be considered “unserved.” Hence, it makes sense, at a practical level, to direct use of CASF monies to “unserved” areas first, and only later, if at all, to direct such funds for use in

¹⁷ Approximately 26 seconds, more or less. The calculation can be done using the information available through http://www.matisse.net/bitcalc/?input_amount=10&input_units=megabytes¬ation=legacy. The Commission should keep in mind that there are many factors that affect *actual* transmission speeds on the Internet, including priorities that may or may not be assigned to certain kinds of traffic that may or not be in play at any given time. In fact, once these factors are taken account, the purported difference between 768 kbps and 1 MBPS is almost fanciful and, in any event, entirely unconvincing, especially given the comparative rarity of a residential consumer sending a file as large as 10 megabytes upstream. This only begs all the more strongly for the real reason why the PD chose 1 MBPS as the minimum upstream speed for determining whether an area is “served” for CASF purposes.

¹⁸ It is expected that the California Broadband Task Force Report (“the Report”) will be released in December. See <http://annenbergl.usc.edu/AboutUs/News/071127DigitalInfrastructure.aspx>. Presumably, the Report will identify the areas of California that already have broadband as defined in the PD and the areas that do not, as well as areas that may be expected to have broadband in the near future.

“underserved” areas. This will help ensure that broadband is made available on the widest possible geographic basis, *i.e.*, available to those who today do not have broadband at all.

II. THE LEGAL JUSTIFICATION FOR THE CASF IS NOT PERSUASIVE.

In its September 26, 2007 Comments on the September 12, 2007 Assigned Commissioner’s Ruling of Commissioner Chong on “Phase II Issues Relating to the ‘California Advanced Services Fund’” (“the ACR”) in this proceeding, Sprint Nextel observed that “. . . the Commission needs to shore up the legal footing for the CASF.”¹⁹ Unfortunately, this is still the case. The PD’s legal justification for the CASF is still not persuasive. To assist the Commission in its consideration of the PD, and further, to indicate the areas where further work seems desirable, Sprint Nextel offers the following comments for the Commission’s consideration. At a minimum, these comments may help the Commission discern a viable legal foundation for the CASF that, at least at present, Sprint Nextel does not see.

Broadband Internet access service is not a telecommunications service – it is an interstate information service.²⁰ The Commission does not have jurisdiction over the provision of information services.²¹ Thus, the Commission lacks jurisdiction over the provision of “broadband” as that term is used in the PD.²² Yet, somehow, the PD concludes that, under the auspices of the high cost fund surcharge, a surcharge on intrastate services designed to subsidize the provision of basic telephone service (also an intrastate service), the Commission somehow

¹⁹ See “Opening Comments of Sprint Nextel on Assigned Commissioner’s Ruling on ‘Phase II Issues Relating to the California Advanced Services Fund,’” dated September 26, 2007, at 2, 6-12, available at: <http://docs.cpuc.ca.gov/efile/CM/73289.pdf>.

²⁰ The PD itself correctly notes that “high-speed transmission” used to provide Internet access service “is a functionally integrated component of that service.” PD at 6, n. 13, *citing National Cable & Telecommunications Assn. v. Brand X Internet Services* (2005) 545 U.S. 967 (“*Brand X*”). *Brand X* affirms the FCC’s decision to characterize “high speed” or “broadband” Internet access service as an information service, and not a telecommunications service. See *Brand X*, *supra*, 545 U.S. at 987-992. The FCC has also held that wireline broadband Internet access service is an information service rather than a telecommunications service under the Communications Act. See *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking FCC 05-150 (released Sept. 23, 2005).

²¹ Since at least 1980, state regulatory commissions have not had (and do not have) jurisdiction over information (enhanced) services. See *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)* (1980) 77 F.C.C. 384, 417-423 and its progeny; see 47 U.S.C. § 153(20) (definition of an information service); see *Computer and Communications Industry Ass’n v. FCC* (D.C. Cir. 1982) 693 F. 2d 198, *cert. denied sub nom. Louisiana Pub. Serv. Comm’n v. FCC* (1983) 461 U.S. 938 (affirming FCC preemption of state regulation of enhanced services); see *In re Federal-State Joint Board on Universal Service* (1997) 12 F.C.C.R. 8776, 9179-9180, ¶ 788 (all services previously considered enhanced services are information services under the Communications Act, as amended by the Telecommunications Act of 1996).

²² At various places, the PD attempts to blur the line between information services and telecommunications services by referring to broadband as, or implying that broadband is, an “advanced telecommunications service.” See PD at 6; see also *id.* at 17 (again referring to broadband as an “advanced telecommunications service”). This attempt to blur the line is unconvincing, since, as explained above, “broadband” is not a telecommunications service.

has jurisdiction to subsidize a service over which it has no jurisdiction. The PD does not successfully explain how (under the guise of subsidizing basic service) the Commission could subsidize an interstate information service (broadband Internet access service) that the Commission does not, cannot and, for that matter, should not regulate.

The PD advances four separate grounds on which creation of the CASF is supposedly justified: (1) Public Utilities Code Section (“PU Code §”) 739.3; (2) Article XII of the California Constitution; (3) PU Code § 701, and (4) the claim that “funds to be used by the CASF will be collected and appropriated consistent with Legislative direction to existing universal service programs.”²³ None of the alleged justifications is persuasive.

First, if anything, PU Code § 739.3 actually stands as an obstacle to creation of the CASF as it is envisioned in the PD.²⁴ This statute authorizes the Commission to “develop, implement, and maintain a suitable, competitively neutral, and broadbased program to establish a fair and equitable *local rate support structure* aided by universal service rate support to telephone corporations serving *areas where the cost of providing services exceeds rates charged by providers*, as determined by the Commission.”²⁵ Repeating the words of the statute, the PD asserts that a “suitable, competitively neutral, and broad-based program targeted toward broadband infrastructure is critical to ensuring ‘a fair and equitable local rate support structure’ in high cost areas.”²⁶ The asserted connection, however, between the CASF and a fair and equitable local rate structure is not only invisible but non-existent, because nothing in the CASF as envisioned in the PD will go to the “local rate structure” or establish, subsidize, or support a “local rate structure,”²⁷ much less a “fair and equitable” one.²⁸ The PD asserts that, inasmuch as “voice services [will be required to²⁹] ride on broadband infrastructure as an application, . . .

²³ *Id.* at 11, fn. omitted.

²⁴ The PD does not mention that PU Code § 739.3 expires as of January 1, 2009. *See id.*, subd. (f).

²⁵ PU Code § 739.3, subd. (c) (emphasis added).

²⁶ *Id.* at 19, fn. omitted (*citing* PU Code § 739.3, subd. (c)).

²⁷ The PD actually states, in contrast to the statute, that the “implementation” of the CASF “provides an opportunity to take a further important step toward promoting access to state-of-the-art technologies,” *id.* at 13; this espoused purpose of the PD, *see id.* at 13-18, is quite different than PU Code § 739.3’s “support” of the “local rate structure.”

²⁸ While subsidized broadband providers would be required by the PD to offer a “voice service” riding on the broadband service, *see id.* at 19, they would not be required to offer it at any particular price. The PD forswears requiring that *either* broadband *or* “voice service” be offered at any particular price, but proposes to evaluate CASF “funding requests by considering the prices at which applicants propose to offer broadband service. Applicants with lower prices pledged for a particular time frame on a voluntary basis will receive more favorable consideration.” *Id.* at 41. It is noteworthy that the price commitment requested is for *broadband* service, *not for* “voice service,” as this underscores the disjunction between the CASF as envisioned in the PD and alleged support of a local rate structure.

²⁹ *See id.* at 19. What the PD refers to as “voice service” is not actually “voice service” as that term is commonly understood, but instead “voice over Internet Protocol” (“VoIP”) service. While frequently (and increasingly) considered a close (or at least reasonably close) substitute for “voice service,” VoIP is not “voice service.”

provisioning broadband in high cost areas does tie in directly to our universal service goals relating to voice service.”³⁰ However, the PD does not explain, nor could it, how the provision of unregulated VoIP service (for which providers could charge whatever they thought the market would bear) riding on unregulated broadband (also subject to pricing at whatever the market will bear) could be seen as establishing a “local rate structure.” The PD even more egregiously and indisputably departs from the text of PU Code § 739.3 in providing that “CASF funding will not be restricted only to those areas currently designated as ‘high cost’ for purposes of basic service support.”³¹ Far from limiting use of CASF funds to “areas where the cost of providing services exceeds rates charged by providers,” as required by PU Code § 739.3, subd. (c), the PD does the exact opposite. The conflict with the statute is clear and undeniable. Thus, the Commission is unwise to rely on PU Code § 739.3 as providing authority for the CASF.

Second, the PD proposes that the Commission “use [its] authority under Article XII of the California Constitution. . . .”³² The significance of the PD’s mention of Article XII is impossible to fathom, since the PD does not quote from Article XII or explain how Article XII could possibly be relevant to whether the Commission can appropriate funds to subsidize a service that the Commission does not regulate. Perhaps the PD’s point is that the Commission is an agency of “constitutional stature” or “constitutional origin.” While it is undeniably correct that it is the California Constitution that created the Commission, that fact does not confer jurisdiction on the Commission to impose a surcharge for a service the Commission does not regulate.

Third, the PD’s citation of PU Code § 701 also does not avail the Commission at all. PU Code § 701 authorizes the Commission to “. . . supervise and regulate every public utility in the State” and “do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.” The Commission may indeed be empowered to “do all things necessary and convenient” in the exercise of its jurisdiction, but this power does not authorize the Commission to exceed its jurisdiction or to disregard specific legislative restrictions, including those in Chapter 1.5 of the Public Utilities Act, permitting expenditures *only* for the purposes specified therein.³³

³⁰ *Id.*

³¹ *Id.* at 40. The PD would even apply CASF funds to areas served by the Small LECs. *Id.*

³² *Id.* at 11; *see also id.* at 21, n. 36.

³³ *See Assembly of the State of California v. Public Utilities Commission* (1995) 12 Cal. 4th 87, 103-04 (“*State Assembly*”) (rejecting, *inter alia*, any claim that PU Code § 701 gave the Commission authority to override express legislative restrictions). The effort, if it is one, to brush aside restrictions in PU Code §§ 270, 276, 276.5 and 739.3

Specifically, Section 270, subds. (b) and (c), limit the power of the Commission to expend moneys to the purposes set forth in Chapter 1.5. The purposes authorized in PU Code § 276 are either (a) transferring funds to telephone corporations “. . . to create a fair and equitable local rate support structure” or (b) the development of a grant program under PU Code § 276.5. As explained above, creation or, as the PD would have it, “implementation” of the CASF does not fit within these parameters because: (a) the CASF is not being used to create a fair and equitable local rate structure and (b) the CASF is not a “grant program” under PU Code § 276.5. Given the caution in *State Assembly* that PU Code § 701 does not permit the Commission to disregard restrictions imposed by the Legislature, the Commission should not rely on PU Code § 701 as its source of authority for the CASF.

Fourth, the PD appears to assert that as long the Commission funds the CASF in the same manner as the CHCF-B program is funded, then its jurisdiction to proceed with creation of the CASF cannot be questioned.³⁴ This argument, however, overlooks the fundamental difference between funding a program to subsidize the provision of basic service (a service over which the Commission has jurisdiction) in alleged high cost areas pursuant to PU Code § 739.3, which clearly confers jurisdiction for that purpose, and an entirely different program to subsidize the provision of broadband, a service over which the Commission has no jurisdiction. The CHCF-B program, consistently with PU Code § 739.3, is limited to alleged high cost areas, but the CASF would operate to provide subsidies in any area of California, whether it is an alleged high cost areas or not, which is clearly outside the scope of PU Code § 739.3. Thus, the PD is mistaken in asserting that the CASF will operate in the same manner as the CHCF-B program.

The PD also appears to cite creation of the California Emerging Technology Fund (“CETF”) as support for creation of the CASF.³⁵ The CETF, however, was created as a result of the voluntary undertakings of SBC and Verizon in connection with their mergers with AT&T Communications of California and MCI, respectively. Creation of the CETF provides no

in order to create the CASF does not comport with *State Assembly*. See *id.* at 103-04, explaining that, “Past decisions of this court have rejected a construction of section 701 that would confer upon the Commission powers contrary to other legislative directives, or to express restrictions placed upon the Commission’s authority by the Public Utilities Code. [Citation.]”

³⁴ See PD at 11, n. 18 (“As long as awards would be administered in a manner consistent with the statutory guidelines for the CHCF-B, we consider it to be within the permissible statutory framework of Pub. Util. Code § 270”). As Sprint Nextel has explained, however, as envisioned in the PD the CASF directly conflicts with PU Code § 739.3, subd. (c), in at least two distinct ways. As a result, the Commission cannot claim that the CASF is “within the permissible statutory framework of” PU Code § 270.

³⁵ See *id.* at 13.

authorization for the Commission to take CHCF-B funds to fund a subsidy for a service the Commission does not regulate.

Likewise, the PD's citation of the Digital Infrastructure and Video Competition Act ("DIVCA") and provisions of PU Code § 5810, subd. (a),³⁶ provides no warrant for the Commission to take CHCF-B funds and apply them to a different purpose, in different areas, than is authorized by PU Code § 739.3. If the Legislature, in enacting DIVCA less than two years ago, had truly intended to authorize the Commission to impose a new surcharge to help subsidize some broadband providers as opposed to others (using what will inevitably be a subjective scoring system³⁷), the Legislature could easily have done so. The fact, however, is that it did not do so.

The PD, in essence, asserts that the sheer importance of broadband to the future of California is so great that, whether consumers perceive the apparent necessity or not, and regardless of the fact that it does not have jurisdiction over broadband, the Commission "must" fund this information service.³⁸ Yet, however "necessary" or desirable such funding may be, neither necessity nor desirability gives the Commission jurisdiction to appropriate money for a service over which it does not have jurisdiction. The PD repeatedly points to the "policies" found in PU Code § 709,³⁹ but these "policies" do not empower the Commission to create a new surcharge⁴⁰ on intrastate services for an interstate information service that the Commission cannot, does not and should not regulate.⁴¹ The PD unfortunately takes an overly generous approach to the policies set forth in PU Code § 709.

Sprint Nextel continues to believe that the Commission would do best to obtain legislative authorization for the CASF. An initiative this important would fare better if it were

³⁶ See *id.* at 16 and n. 25.

³⁷ See *id.* at 29. Given the multiple criteria envisioned as part of the scoring system, it will be inherently subjective.

³⁸ See PD at 3 ("Broadband infrastructure is critical to the economic health and welfare of the state and its citizens. Broadband deployment will be a key measure of success in our information economy and is crucial to future productivity of the State." (fn. omitted)). See also *id.* at 10-11 (funding for broadband in "unserved and underserved areas of California is necessary"). Allegedly, it is "necessary" in order "to meet the objectives of universal service." *Id.* at 11.

³⁹ See *id.* at 12-13 and 16, nn. 25 and 26.

⁴⁰ See *id.* at 23. The CASF will actually be funded using California High Cost Fund-B ("CHCF-B") monies. See *id.*, n. 39, but *cf. id.* at 10 (funds will be collected for the CASF using the CHCF-B surcharge). Under the PD, California consumers would not actually see on their bills that they were being surcharged to fund the CASF. They would simply see the CHCF-B surcharge.

⁴¹ The anomalous nature of the Commission's attempting to subsidize a service that it does not regulate is most fully revealed in the PD's statement that, "We shall impose a requirement that as a condition of receiving a CASF award, the recipient must make a commitment for a five-year period to offer broadband service to any residential household or small commercial business within the service territory covered by the deployment." *Id.* at 41. In imposing such requirements, and evaluating grant proposals on the basis of applicants' proposed prices, *id.*, the Commission will inevitably be regulating services over which it has no jurisdiction. The CASF will not be off to a great start.

crafted by the Legislature. In view of the Governor's recent endorsement of a more vigorous program to spread the availability of broadband in California,⁴² it appears likely the Governor would readily agree to legislation authorizing a CASF. Legislation authorizing the creation of the CASF would eliminate uncertainty, preclude litigation, prevent delays, and thereby help ensure the success of the CASF program.

III. IF IT ELECTS TO GO FORWARD WITH THE CASF, DESPITE THE SUBSTANTIAL POLICY AND LEGAL CONCERNS EXPLAINED ABOVE, THE COMMISSION SHOULD MODIFY THE DESIGN OF THE CASF.

As can be seen from the comments above, Sprint Nextel has substantial reservations regarding the PD on both policy and legal grounds. Nonetheless, Sprint Nextel is aware of the forces that may lead the Commission to adopt the PD. If it elects to go forward with creation of the CASF, despite the substantial policy and legal concerns it raises, the Commission should modify the PD to help ensure that CASF moneys are directed to areas that are truly "unserved."

Sprint Nextel opposes use of CASF monies to fund broadband in areas that, at least as the PD presently reads, already have broadband but are nonetheless defined in the PD as "underserved" areas.⁴³ If it elects to go forward with the CASF, the Commission should eliminate the concept of "underserved" areas. The Commission should determine that areas are either "served" or "unserved."

Under the approach recommended by Sprint Nextel, CASF funding would not be available for "served" areas, *i.e.*, if they had either "wireline broadband" *or* "wireless broadband." "Wireline broadband" would be defined as any area with either "telco broadband" (digital subscriber line ("DSL") offering *at least* 3 MBPS downstream and 768 kbps upstream) or "cable broadband" (cable-modem-based Internet access service with speeds at least equal to those offered by "telco broadband"). For the purposes of this approach, "wireless broadband" would be defined as any wireless service offering Internet access at speeds equal to or higher than EV-DO presently offers. This approach would ensure that CASF moneys do not go to areas that *already* have a broadband provider because the opposite result would make no sense at all.

⁴² See "Governor Keynotes USC Annenberg Conference on California's Digital Infrastructure," posted November 27, 2007, available at: <http://annenberg.usc.edu/AboutUs/News/071127DigitalInfrastructure.aspx>. The video clip of the Governor's speech, available through this hyperlink, discloses that the Governor is an enthusiastic supporter of a public-private partnership for spreading broadband services. *Id.*

⁴³ The PD defines an "underserved" area as an area with only one broadband provider. See *id.* at 40. With all due respect, this makes no sense. As stated above, an area that already has a provider offering Internet access at 3 MBPS downstream and 1 MBPS (or 768 kbps, as Sprint Nextel recommends) should be considered "served" and should not be considered eligible for CASF funding.

Alternatively, if it elects to retain the concept of “underserved” areas, the Commission should structure the CASF program in the following manner:

1. CASF funding would be heavily prioritized to serve areas that are “unserved,” with “underserved” areas receiving funding only if there are no longer any “unserved” areas.⁴⁴
2. Any area that has one (even if only one) provider of broadband, *i.e.*, a carrier that, using any technology, offers at least 3 MBPS downstream and 1 MBPS upstream, would be considered “served” and therefore ineligible for CASF funding.
3. Any area that has (a) at least one provider offering either (i) ILEC “premium” DSL service (at least 3 MBPS downstream, 768 kbps upstream) or (ii) cable modem service with speeds equivalent to premium DSL service, AND (b) another provider offering mobile broadband service (for example, offering Internet access at EV-DO speeds) would also be considered “served,” not “underserved,” and therefore ineligible for CASF funding.
4. Any area that has at least one of the following: (a) ILEC “premium” DSL service (at least 3 MBPS downstream, 768 kbps upstream), (b) cable modem service with speeds equivalent to premium DSL service or (c) mobile broadband service with at least EV-DO speeds, would be considered “underserved,” and therefore eligible for CASF funding, but subject to having a much lower priority, as indicated above.
5. Any area that has NEITHER ILEC “premium” DSL service (at least 3 MBPS downstream, 768 kbps upstream), NOR cable modem service with speeds equivalent to premium DSL service, NOR mobile broadband service with at least EV-DO speeds would be considered “unserved” and would have the highest priority.

These modifications would reduce the size of the areas that the PD deems “underserved” and would make more funds available for areas that are completely “unserved.”

To ensure that the Commission utilizes funds collected for the CASF program as prudently and efficiently as possible, the Commission should, in addition to modifying the CASF program as recommended above, take care to subsidize *only* the most efficient technology or to fund those utilizing a less efficient technology *only* up to the level that would have been required to fund the most efficient technology. The Commission should ensure that it does not provide more funding than is necessary to bring broadband to a given project area.⁴⁵ If the most efficient technology to serve a given area is, for example, wireless technology, as seems likely in many rural areas, then the Commission should fund only to the level needed for the deployment of that

⁴⁴ The PD, at 40, appears to state that priority in granting applications for CASF moneys would be given to “unserved,” as opposed to “underserved,” areas. The Commission should ensure that, absent extraordinary circumstances, CASF moneys will go to “unserved” areas before they go to “underserved” areas.

⁴⁵ The PD would require applicants to provide a minimum of 60% matching funds as a prerequisite to obtaining a CASF grant. *See id.* at 37. To ensure that funds are available for as many “unserved” areas as possible, the Commission should increase the matching funds requirement to not less than 75% of the project cost.

technology, even if the carrier selected by the Commission to receive a CASF subsidy does not plan on using that technology. This will ensure that CASF funds are used in the most efficient way possible and thereby ensure the widest possible deployment of broadband in California.

One final point deserves mention. The PD would require CASF recipients to “offer a basic voice service to customers within the service area of the broadband deployment subject to the CASF grant.”⁴⁶ The PD correctly provides that “any form of voice-grade service, including that offered by a wireless or VoIP provider” will be acceptable for CASF purposes.⁴⁷ The Commission should retain this pro-competitive and technology-neutral approach to the CASF.

Conclusion

For the reasons set forth above, Sprint Nextel has substantial reservations, on both policy and legal grounds, regarding creation of the CASF. The Commission would best serve California’s long-term interest in continued investment in advanced services if it resisted the allure of creating the CASF. However, if, as appears likely, the Commission elects to proceed with creation of the CASF, the PD should be modified as set forth above. The modifications proposed by Sprint Nextel will make more funds available for areas that are completely “unserved,” and minimize the marketplace harms that will result from this new subsidy.

[signature page follows]

⁴⁶ *Id.* at 32.

⁴⁷ *Id.*

Respectfully submitted:

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Dated: December 10, 2007

Certificate of Service

I, Earl Nicholas Selby, hereby certify that, on December 10, 2007, I caused a copy of the foregoing document, entitled:

**COMMENTS OF SPRINT NEXTEL
ON PROPOSED DECISION IMPLEMENTING
CALIFORNIA ADVANCED SERVICES FUND**

to be served on the parties to this proceeding by electronic mail to the electronic mail addresses on the service list maintained on the Commission's Web site for this proceeding, as indicated on the following page.

I also certify that, on December 10, 2007, I caused a copy of the foregoing document to be served on the following persons at the California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102, by United States Mail, first class postage prepaid:

Commissioner Rachelle B. Chong, Advisor Robert Haga, and Administrative Law Judge Thomas R. Pulsifer. I further certify that, on December 10, 2007, I caused a copy of the foregoing document to be served on: La Tanya Linzie, Cox California Telcom, LLC, 2200 Powell Street, Suite 1035, Emeryville, CA 94608, by United States Mail, first class postage prepaid.

I certify that the above statements are true and correct.

Dated: December 10, 2007 at Palo Alto, CA.

_____/s/
Earl Nicholas Selby

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